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Incentivizing Success: Advancing Client Value Through Early Resolution

I. Setting the Context

Competitive Landscapes for All Parties

It is a challenging time for both law firms and claims executives. At a high level, competition is driving significant behaviors, for firms and carriers alike. Roughly 85% of all claims executives believe that the landscape is much more competitive for law firms than it has been previously.

Outside firm panels are also consolidating. Roughly 60% more firms were removed from panels in a 3-year period than were added. On average carriers removed 50% more firms than they added.

The environment is competitive for insurance carriers as well. According to EY, sluggish GDP growth means lowered premium expectations. Insurance company yields have also been falling for more than a decade, sparking more consolidation. Lastly, more than 70,000 insurance professionals retired in the last year, sparking a massive competition for talent – particularly for litigation talent that can perform at high levels.

According to Deloitte, these influences mean that insurers need to have a laser focus on expense optimization. This in turn, affects law firms and how they demonstrate their performance in this environment.

The focus on early resolution of litigation is premised on three assumptions. These are that most cases will settle, that many will settle for amounts that can be predicted early in the process, and that the winners will be those who can resolve cases for that amount, earlier in the process. The losers will be those who can't.

At the same time, it may not be enough to simply resolve cases earlier; both carriers and law firms are under pressure to prove that they are accomplishing early resolution. This means that firms must learn how to measure their performance and also demonstrate it.

Today's conversation will showcase several examples of how firms and carriers can align around early resolution strategies, while using the right technologies and methodologies to demonstrate their successes.

II. Managing the Litigation Portfolio

- A. If approximately 97% of cases resolve prior to trial, let's pretend that more than 3% are tried.
 - 1. The "buckets" of litigation
Not all litigation is created equal. Matters that move in to litigation have different underlying reasons. Some litigation is created due to a failure of the claims process. Frustrations and/or

delays create an atmosphere that propels an otherwise “regular” claim into unnecessary litigation. Other litigation may have found its way to that position for an appropriate reason but the issues in question could be resolved through collaboration, creativity and/or dedicated focus on solving simple problems before they become complex. Another bucket of claims that become litigated are those where litigation is likely expected due to larger, more complex issues. Those generally entail serious injury or damage, may involve multiple parties and may also have major disputes with regard to liability and/or damages. An awareness of the WHY a matter is in litigation is a great first step in the resolution process.

2. Using all our muscles – the lawyer as problem solver
Abraham Lincoln was known for the following quote: “Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.” With the great majority of cases resolving short of trial, the opportunities appear endless to find ways to resolve matters at an earlier juncture, in a more efficient manner and with an appropriate outcome for all parties.

B. Picking the early resolution lock, otherwise known as the early bird gets the worm.

1. Finding the most appropriate exit ramp
There are many impediments to the resolution of a litigated matter. However, a strong exploration and understanding of why the file is in litigation allows for the best chance to begin determining the most successful strategies to bring the file to conclusion.
2. To the creative go the spoils
If, as it has been said, that the most successful lawyers are those that are creative, the creative resolution problem solver would appear to have a strong marketing edge. Depending on client objectives, the ability to resolve files in a timely and appropriate manner will likely endear the successful attorney to their clients. At first blush, shorter file life cycles appear to be at odds with a firm’s business model. However, successful positioning around resolution success will very likely enhance the firm’s status with their clients resulting in a larger volume of work that will more than make up for other business volume impacts.

C. The last 7 words of a dying enterprise – “that’s the way we’ve always done it”.

1. Embracing the metrics
The world has become saturated with data. No industry segment can escape the continued immersion of analytics as an operational element. The legal services arena is no exception. Data will continue to be used to identify appropriate costs and performance metrics. Carriers and firms that continue to understand, collaborate on and leverage data elements will likely be the most successful. Metric opportunities are numerous in the resolution context and players that embrace the opportunities to tell great stories through their data will have a competitive advantage.
2. Ensuring focus on client value...and the winner is...
In the marketplace, at the end of the day, it is generally agreed that the client always wins. Today’s competitive world demands that providers focus on client value and ways to deliver on that value in new and improved ways. The ability to align focus and goals with the client will continue to be more and more vital. Firms that can incentivize their team members to meet and exceed client goals will be well positioned to survive and thrive.

III. The importance of a matter management platform that addresses how to capture metrics and technology that supports early case resolution

A. Benefits of an E-Billing system

1. Capturing critical data

From a matter management standpoint, you must first have the data to audit before you can even begin to incentivize. Having an e-billing system is critical to help streamline the approach on how the data is collected and analyzed while providing a secure platform where effective collaboration can take place. Without the use of it, you may be able to spot a one off anomaly but the importance of auditing is not feasible in the long run without it. As the old saying goes, you can't improve what you don't measure.

2. Secure/Safe platform where collaboration can take place and be memorialized

The information collected from your e-billing system will give you the details and tools to collaborate with the firms and show them the importance of that communication. For example, if you are trying to move your firm to early settlement where appropriate, you can pull examples of total case costs from the past, and show the benefits to the total cost when appropriate cases are settled early. You could also, simply utilize this past data as a roadmap, to guide your decision making and thoughts on the current case, by looking at past cases with similar complexity and dimensions. The communication is memorialized to help provide the history and give critical details of why certain decisions were made. In order to move the needle to incentivize you have to be able to track the key data elements and have a way to go back and reference it. By having the means to capture and collect the data and then review, is the only way to move forward with program evolution. The last thing you want to be doing, when you are looking at a case that has familiar parallels to your previous work, is digging through random emails to determine what had been done in the past.

B. Use of Uniform Task-Based Management System Codes

1. Understanding the clear distinction between the different types of cases and the point of time of when they settle

A critical step in understanding what types of cases and when cases are going to settlement is the accurate use of Uniform Task-Based Management System Codes (UTBMS). If firms apply the accurate codes when submitting invoices, it provides a gateway into the understanding at what phase the case was in at the time of settlement. It can provide details that may help provide the clarity needed to understand that not every case should settle. You may see a gap and find that there are more details needed when a case has entered a specific phase and proper information needs to be communicated. Having these details captured within your e-billing system provides a secondary benefit which gives you the ability to make long term strategic decisions based upon the visibility of the point in time the case settled and the details that lead to the pre-settlement.

2. Aggregate set of codes provides general insight of case progression

The important part, isn't that the Uniform Task-Based Management system does (UTBMS) codes are perfect. Everyone knows that these aren't always exact, we aren't labeling elements on the periodic table when we apply a Uniform Task-Based Management System code (UTBMS). However, if in general, the right codes are applied most of the time, in the aggregate, given the large raw data set that invoices provide, you can gain general insights about the progression of the cases and when the appropriate steps were taken in similar situations/cases in the past.

C. Understanding case cycle times

1. Knowing your full case inventory and how long does it take before they close

Another key component is understanding your case cycle time and your full case inventory. What cases are being opened and how long is it taking before they close. Understanding that distance of what it takes to get to settlement is very important. Not all cases fall into the same complexity causing very different results. To be able to successfully understand the differences in case cycle time, you will need to be able to segregate that data by line of business and complexity and more. As a case manager, this is likely one of the most critical pieces of information you can monitor – understanding your current inventory and the trends in your cycle time, especially at a very discreet level, is the necessary first step to controlling those times. It's obvious when you say it out loud, you need to know your current times, to improve them.

2. Case Assessments, a tool to understand case cycle times

A useful tool, in understanding those cycle times, are Case Assessments. Case Assessments are a common approach that requires different types of questions to be answered either by the matter handler or directly from the firm that knows the information best or more commonly both. Allowing the questioning that is being required to be dynamic and flexible based on the line of business and case types gives you the ability to give accurate surveying that will provide you with the appropriate insights based on the criteria. Building in the line of questioning into workflow tasks can help put reminders to your firms that before proceeding specific actions must be completed. In simple terms, new phases or steps in the progression of the case, requires the completion of new survey questions. Maybe you require seeing a budget before their invoicing begins but before they even add the budget you may have a trigger for a list of questions to understand more details around the case to ensure that the budget is alignment with the type of work that is to be done. Answers to the questions being provided helps define patterns and opportunities to create best practices. Once best practices are defined you can help set expectations with outside counsel in settlement opportunities.

D. Targeted Key Performance Indicators (KPI's) – Reporting

1. Actionable Reporting

The last step, is just pulling this all together. If you are collecting everything that we just talked about, your final step, is simply using these critical Key Performance Indicators (KPIs) you have collected into actionable reporting. So reports that look at cases, by segmented line of business, complexity, geographic location, etc. and then pull the data fields, such as those previous cases cycle times, the critical billing and phase information and the relevant case assessment questions. You can then build a picture, through this reporting of a likely road forward. This isn't one-to-one and it never will be. The practice of law is always going to have nuance and certain cases will always be deviations from past norms. However, being armed with this knowledge of the norm, from the Key Performance Indicators (KPIs) we have collected above, gives us a good map to proceed. Think of it like the GPS in your car, it's going to make some recommendations that it thinks are best, warn you about new construction, accidents on the road – basically those things that would get in the way of a smooth trip. However, you might just choose to go your own way, because your experience tells you that it will be faster. This is exactly the same. The metrics gathered in the system are valuable pieces of data that help you improve process. Targeted Key Performance Indicators (KPI's) provides key data elements without having to impose impact onto the claims handlers and outside counsel to their existing work stream. High level rollup is less meaningful but having the ability to drill down to details for a particular type of matter, in a particular line of business or other specific claim criteria can provide you the answers to how quickly do I expect this to move through settlement and are the firms understanding what the expectation is.

IV. The Why and How to Law Firms Incentivizing Early Creative Resolution Success

- A. The importance of fostering a law firm culture that supports a consistent focus on early creative resolution success (ECRS)

1. ECRS supports the ethical duty of lawyers to be good managers of their clients' resources

Attorneys have an ethical duty to their clients to be good managers of their clients' resources. This includes sums clients spend on attorney's fees and other costs of litigation. Under the tripartite relationship, an insurance defense attorney has two clients, the party they appear for and the insurance company that retains them. Being a good manager of the clients' resources does not mean cutting corners and missing angles. A good lawyer can be both a zealous advocate of his/her clients' interests and a good manager of their resources by getting to the same good result sooner and more cost effectively. Incentivizing early creative resolution success supports this important ethical duty of the attorney.

2. ECRS promotes engaged employees/lawyers and their calling to be champions for their clients

The article "Be Happy" by Patricia Kagerer, *Litigation Management Magazine*, winter 2015, discusses how happy engaged employees work with passion, are deeply connected to their employer, drive innovation and move the company forward. Actively disengaged employees on the other hand can and probably will create a contagious negative work environment that can ruin brand image, alienate valuable clients, cause expensive mistakes, dissuade new talent, etc. Unfortunately, disengaged and actively disengaged employees outnumber engaged employees by more than two to one in the U.S. See *The State of the Global Workforce, Gallup survey*. Engaged employees see their work as a calling that contributes to the greater good. Billing as many hours as you can to a file is not a calling. An Early Creative Resolution Incentive Program supports the calling of an attorney to be a champion for their clients by performing excellent legal work in the most cost-effective way.

3. ECRS is good for business -it aligns with client objectives and drives improved firm metrics - this increases trust and brings in more cases

Law firms used to be able to be successful by doing excellent legal work but not necessarily cost effectively. Now law firms need two wings to fly. One wing is doing excellent work. The other wing is doing it cost effectively. More and more legal work is being measured and concentrated with firms that reach the same good result in the shortest most cost-effective way.

B. Applying a tiered and year end approach to incentivizing ECRS

1. The hall marks of ECRS and how law firms can effectively communicate them to their attorneys

Incentivizing ECRS represents a shift in focus from a traditional bonus approach based on billable hours to one that incorporates recognition and reward for early creative resolution success. An early creative resolution incentive program is flexible but puts considerable weight on the following factors: 1) how long the file is open; 2) the phase the case is resolved in; 3) how creative the resolution is; 4) the legal spend saved on the file.

2. The nuts and bolts for how firms can incentivize ECRS contemporaneously and as part of a wholistic year-end review - defining the three levels of ECRS

An Early Creative Resolution Incentive Program employs both a tiered and a year-end approach. For early creative resolution cases, the attorney receives an immediate bonus. He or she also receives points that accumulate at the end of the year for a year end resolution bonus for up to a certain percentage of the attorney's annual salary. These accumulated resolution points are also one of many factors considered at the attorney's annual review which impacts his/her raise and position with the firm.

Level 1 is low hanging fruit, a case that is resolved with low creativity, effort and issues. This is a case that resolves within 90 days rather easily. Nevertheless, it is important to recognize the result because it supports the firm's metrics and shared objective with its clients of early resolution. The attorney receives an immediate small bonus and one point toward a year end early resolution bonus.

Level 2 (Moderate creativity/effort/issues) This is a case where there is a fair amount of creativity and effort to resolve the case early in the process, but it could be resolved more than 90 days out. The attorney receives an immediate bonus and three points towards a year end early resolution bonus.

Level 3 (High creativity/effort/issues) This is a case where the resolution is highly innovative or where there has been outstanding effort by the attorney to get a case that presents difficulties resolved. It would most likely employ a strategy that would be shared with the rest of the firm and the client to build knowledge towards future early resolution success and reinforce the firm's focus on the objective. The attorney receives an immediate larger bonus plus five points towards a year end early resolution bonus.

Note* When a case is reviewed for an early resolution bonus, firm management considers whether the best approach was used to achieve the best result for the case. A case that resolves early on for the wrong reasons is not eligible for a bonus.

C. It is time to educate and align with the plaintiff's bar to get to ADR sooner

Sharing what is trending with insurance companies and defense firms for managing litigation is eye opening for the plaintiff's bar and judges. It provides the backdrop for the message that the plaintiff's bar and defense bar have a natural alliance to do just what is necessary to zealously represent their client while getting to a resolution point sooner (i.e. ADR), understanding that the vast majority of civil cases settle. The more that the plaintiff's bar and defense bar understands this, the less bias there will be against ADR. Rather than signaling weakness by being the first to propose ADR, it will be the plan all along. From a big picture perspective, judges like this approach as well because it supports the public policy of decreasing the court's burden.